

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
BOSTON DIVISION**

JOYCE ROWLEY,  
PLAINTIFF, PRO SE

CASE NO. 21-cv-11649-FDS

V.

CITY OF NEW BEDFORD, MASSACHUSETTS  
DEFENDANT

**FIRST AMENDED COMPLAINT  
FOR INJUNCTIVE & DECLARATORY RELIEF**

This is an Endangered Species Act (ESA) citizen suit action on the matter of captive Asian elephants Ruth and Emily at the Defendant City of New Bedford's Buttonwood Park Zoo. Judgement in a related case found that Ruth's and Emily's care did not harm or harass them, and the Defendant's elephant management met general animal husbandry practices.(C/N 17-cv-11809, Dkt 91).

However, there have been substantial changes to the elephant exhibit and management, to the detriment of both elephants. Notably, the facilities housing them became dilapidated, management of the facilities and elephants changed and, as a result, both elephants now present with pododermatitis--a painful foot disease. Neither elephant had pododermatitis or foot osteitis previously.

In Ruth's case, her left front foot became infected and, due to the Defendant's actions, progressed to septic osteitis. Two of her toe bones in her left foot dissolved. Since the Defendant failed to acknowledge Ruth's foot was infected for over four months, the infection spread to her right foot. The infection then spread to Emily's front right foot.

The Defendant's failure to prevent these injuries are a violation of Section 9 of the Endangered Species Act.

### **I. PARTIES**

Joyce Rowley, Plaintiff pro se, is a New Bedford resident and taxpayer, a member of the Buttonwood Park Zoological Society, and as noted in the related case decision, a "keen observer and frequent visitor" at the Zoo. In fact, she continued to visit Ruth and Emily on a daily basis, often spending one to two hours with them. The conditions Ruth and Emily live in affect Rowley aesthetically, emotionally, and spiritually. Thus, she still has legal standing granted in the related case (Id. Dkt.34).

Defendant City of New Bedford, is an incorporated Massachusetts municipality. It owns and operates the Zoo as a department in the City. Zoo employees are under the Defendant's control.

### **II. JURISDICTION**

This Court has jurisdiction over the case pursuant to ESA 16 USC § 1540(g)

and 28 USC § 1331 (federal question).

Venue in this court is proper pursuant to 16 USC § 1540(g)(3)(A) because the violations complained of occur and continue to occur in Bristol County, Massachusetts. Further, venue is proper under 28 USC § 1391 because a substantial part of the events or omissions giving rise to the claims occurred within this District and Division, and all parties reside here.

### **III. FACTUAL BACKGROUND**

1. Affected Species. Asian elephants (*Elephas maximus*) have been listed as endangered species under the ESA since 1976 (41 Fed. Reg. 24062, 24066. June 14, 1976) and listed as an Appendix I species in the Convention on the Trade of Endangered Species of Flora and Fauna (CITES) since its inception in 1975.

2. Elephants are a long-lived species. The average lifespan for a non-captive elephant is 60-70 years<sup>1</sup>, with some living to their 80s.<sup>2</sup> The population of Asian elephants in United States zoos is aging and shrinking, in large part due to the difficulty of breeding elephants in captivity, and premature deaths due to inadequate conditions in zoos<sup>3</sup>. Of the 321 elephant deaths studied in U.S. zoos

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<sup>1</sup> Vidya, TNC, & Sukumar, R., "Social and reproductive behavior in elephants," CurrentScience, 89:7, (2005) p. 1200--1207.

<sup>2</sup> Sukumar, R. The Living Elephants Evolutionary Ecology, Behavior, and Conservation, Oxford University Press, (2003)

<sup>3</sup> Berens, Michael J., "Elephants are dying out in America's zoos," Seattle Times, Dec. 1, 2012.

between 1962 and 2012, half of the elephants died by age 23 years, about one-third of the average lifespan of their non-captive counterparts.

3. In their natal subtropical habitat, Asian elephants routinely traverse a range of between 105 and 320 km<sup>2</sup> (26,000 and 79,000 acres),<sup>4</sup> often walking 20-30 miles per day.

4. Elephant feet, also referred to as hoofs, have a thick pad on the bottom that acts as a cushion. Elephant foot bones resemble the bones in human feet in that each toe (digit) is comprised of several smaller bones (phalanges). However, in elephant feet, the outermost bone resembles a semi-circle. With the pad carrying most of the weight, it appears the elephant walks on "tiptoes." Nails attached to the soft tissue help give the elephant traction as they walk. (Exhibit 1, Asian elephant foot structure, Credit: Reconstructed CT scan of elephant foot. Sophie Regnault. Attribution-NonCommercial 4.0 International (CC BY-NC 4.0))

5. Elephant feet, legs and joints evolved for extensive walking. Elephant footpads and nails grow constantly, and in the wild are kept clean and healthy through regular walking.<sup>5</sup>

6. Captive elephants kept on concrete or sand are more likely to have foot

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<sup>4</sup> Sukamar, R., Ecology of the Asian elephant in southern India. I. Movement and habitat utilization patterns, *Journal of Tropical Ecology*, 5:1, 1989.

<sup>5</sup> Schmidt, M., *Jumbo Ghosts, The Dangerous Life of Elephants in Zoos*, XLibris Corporation (2001).

problems.<sup>6</sup> If kept standing in moisture and excrement, particularly on hard substrate, captive elephants are predisposed to pododermatitis, also called canker or hoof rot. Other primary factors are lack of exercise and poor nutrition.<sup>7</sup>

7. Osteitis, or osteomyelitis, an infection of the bones, is caused by poor hoof management, and the above factors.<sup>8</sup> Often a sharp instrument or object carries the infection into the bone.<sup>9</sup> Left to fester, the infection dissolves the bone (lysis).

8. Living Conditions. Defendant Zoo's elephant exhibit is under 20,000 square feet of area accessible to Ruth and Emily.

9. The exterior yard is comprised of hard-packed sand/dirt and a 100,000-gallon concrete pool that divides the old exhibit area (12,000 s.f.) from the new area (8,000 s.f.). The pool is rarely used by the elephants and often contains duck waste and algae. The new outer area does not contain a separate potable water source for the elephants for cooling or drinking. When confined to the outer area, the only water available is from a drain pipe at the water feature. In the summer, keepers put out a fire hose and run it to provide water to cool and drink.

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<sup>6</sup> Haspeslagh, M., et al, "A survey of foot problems, stereotypic behaviour and floor types in Asian elephants (*Elephas maximus*) in European zoos," *Animal Welfare* 22:437-443 (2013), p. 441.

<sup>7</sup> Mikota, S. M., Fowler, M., *Biology, Medicine & Surgery of Elephants*, Ch. 20, Foot Disorders, Ch. 35, Veterinary problems of geographic concern, p. 443, 275.

<sup>8</sup> *Id.* p. 277.

<sup>9</sup> *Id.* p. 286.

10. There are two open air timber structures, one on each side of the pool. They do not provide protection from rain, sleet, or snow. The structure on the inner yard, a hut, now lacks a roof and so provides little or no shade.

11. The elephant exhibit is too small to allow elephants to roam or to engage in natural foraging behavior. There are four trees in the outer area but no branches left at a level for foraging.

12. Ruth and Emily spend at least 16 hours each day in the concrete barn while the zoo is closed. In the winter, that increases to 20 hours or more due to inclement weather. In severe weather, they are kept inside for 24 hours, sometimes for days at a time.

13. Until 2017, the barn had an open floor plan with a 1200 s.f. stall and an 800 s.f. stall separated by post and cable; a tool shed area, and a protected viewing area. Renovations to the interior in 2017 divided the two stalls into two smaller stalls of about 800 s.f. each, a central aisle and an “elephant restraining device” or ERD. All are surrounded by steel bars. (Exhibit 2, Floor plan from bid package; Prior open floor plan; Interior photos of barn dated March 1, 2019).

14. The elephants' stalls are 20' x 40' leaving little room for a 12' long elephant to avoid standing in their waste when confined while the Zoo is closed.

15. The barn's concrete floor was partially removed and replaced with a soil floor in 2012. It becomes compacted by the weight of two elephants standing and

walking on it. According to the zookeepers' Daily Logs received under MGL 66, Public Records Access Act, the floor is hosed down, but it is unclear whether this removes the elephants' waste entirely. Hosing may cause additional compaction creating a hard substrate.

16. When the steel bars and gates were installed, it made it particularly difficult for the front-end loader to enter Ruth's stall, turn, and remove soil.

17. Previously, the soil was removed from the stalls and placed outside until it was taken off-site. The last time this occurred was in March 2019.

18. Now, the soil is replaced very infrequently. Instead, the waste-contaminated soil is "rotated," moving it to piles on the interior yard and then back into the barn. (Exhibit 3, Sample Daily keeper log)

19. Between January 14 and June 18, 2021, the soil was not removed from the barn. On June 18 it was removed and placed in piles in the elephants' yard. It was not rotated again until two months later, according to the daily logs.

20. The accumulation of waste-contaminated soil caused a sandfly infestation for several months. (YouTube video <https://youtu.be/VCxyWw4yj84>, Ruth entering the barn. White specks flying around are biting sandflies.)

21. The elephant barn roof has leaked for over two years. A bid to repair it and several other roofs was rejected as too high in August 2021 (Exhibit 4, Bid Awards, City of New Bedford Purchasing Department website). The leak is

reported to be located over the concrete viewing area. The plans for the new roof indicated that there are other areas of the roof that leak. A recent bid for the elephant barn roof was awarded on November 15, 2021.

22. There are two other pipes that also drain water into Ruth's stall from an unknown source, as seen at the March 2019 visit. The roof plans do not call for their removal, despite Ruth's hoof condition.

23. Asian elephant Ruth. Ruth is a 60-year-old female who was captured ~1961. She first shows up in historic newspaper records at Benson's Wild Animal Park in Hudson, NH in 1963 with circus trainer Slivers Madison. According to Bret Bronson, former elephant handler at Benson's, her import papers indicated her birth year as 1960. This was corroborated by Angela Spiegel, a former employee of the East India Camel Co., Ruth's second owner.

24. When brought to the Defendant's Zoo in 1986, Ruth weighed just 5900 lbs. She was considered as being in "poor condition, malnourished." Although at times she weighed up to 7200 lbs., Ruth weighed ~6400 lbs. in December 2019. She weighed 5816 lbs. at the time the Complaint was filed.

25. For the past two years, Ruth has been restricted from moving, eating and drinking when on exhibit. In the linked video, Ruth is seen swaying in stereotypy, and then spots a bit of food on the ground. Rather than step forward, she strains to reach it as if an imaginary chain is on her back leg (Ruth reaching at 50 sec.,



<https://m.youtube.com/watch?v=Jl7oSwBl5uo>). It typifies the forced immobility the Defendant's Zoo has imposed on Ruth.

26. According to the zoo's records, Ruth and Emily receive only 80 - 100 lbs of hay daily and 30 lbs. of grain, supplements, and produce. Asian elephants eat up to 330 lbs. of grasses and grains per day.

27. But on the occasions when Ruth was ordered to stand in place, she was not fed nor could she graze. On other occasions, she was ordered to turn away from her food or move away from it. Zoo staff then claimed that Ruth "had access" to food and water but "preferred" not to eat or drink.

28. As Plaintiff brought this matter to the attention of the Defendant's zoo management time and again, she was met with standard replies that Ruth "preferred" to stand still, that "she has access to food and water," and that it wasn't possible to train Ruth to stand still. (Exhibit 5, email from Zoo Director Keith Lovett,<sup>10</sup> email to Zoo veterinarian Erica Lipanovich). However, Ruth's behavior was in stark contrast to the previous eight years that Plaintiff visited the zoo and observed Ruth and Emily moving freely around the (albeit small) exhibit. It appeared Ruth had been trained to turn away from food, even as she was

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<sup>10</sup> If Mr. Lovett's reasoning is accurate, and Ruth's behavior is not the result of positive training that allows elephants the choice of whether to participate or not, Ruth's immobility is the result of negative or adverse training. Such training methods would include food and water deprivation and physical force (beatings). But however it was accomplished, her immobility clearly isn't her choice.

eating. (Video taken July 27, 2020 at <https://youtu.be/3moOgdQFEZE>).

29. Although Ruth has had foot abscesses, and joint arthritis in the past as a result of zoo living conditions,<sup>11</sup> she has not had canker (hoof rot) and septic osteitis in her feet prior to January 2021. Further, the Defendant actively treated her joint arthritis with laser therapy and her hooves with proper management.

30. At her 2021 annual health assessment, the records show that Ruth's nail had no defects. But January 27, 2021 records show new nail defects caused by hoofwork by a keeper. (Exhibit 6, Clinical records dated January 27, 2021) The Defendant then failed to perform even the minimal rotation of the barn dirt floor until June 18, 2021, although Ruth was receiving treatment for the canker.

31. Between January 27 and April 27, the Defendant did little to heal Ruth's hoof. Notes indicate that it was trimmed by keepers, soaked but no radiographs, cultures, or biopsies were performed. By April, the canker, also referred to as a lesion, had grown and was causing Ruth pain. According to the Zoo's clinical records during April, several consulting veterinarians recommended against trimming the canker for at least a month because it may cause osteitis (Exhibit 7, Clinical records for Ruth, dated April 27, 2021). The clinical records also note that "Trimming stimulates growth of the [proliferative] tissue."

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<sup>11</sup> Both elephants have been given glycoflex for joint health. Ruth receives ibuprofen as well since 2015. Both elephants have had occasional laser therapy for arthritis in their leg joints.

32. May 9 and May 11 clinical notes show that additional consultants recommended against trimming. (Exhibit 8, Clinical notes dated May 9 and May 11, 2021). Yet the Defendant trimmed the canker six times between June and July, although she noted there was still a risk of osteitis. In that time, Ruth's nail bed blew out (Exhibit 9. Photos dated June 12 and July 12, 2021).

33. Defendant continued to trim the canker another 15 times over the next three months, sometimes "aggressively."

34. On May 7, four months after the canker started, the Defendant took a culture, which indicated Ruth's foot was infected by at least one agent. The result was ignored, although the canker was malodorous. A month later, on June 4, a second culture was taken indicating the presence of three strains of bacteria. The clinical notes on June 10 indicate these were disregarded as "contaminants." On June 24, 2021, Ruth's right front foot also had proliferative pododermatitis. Still the Defendant denied it was from an infection (Exhibit 10, Clinical records dated June 4, June 10 and June 24, 2021).

35. When a third culture taken at the end of July indicated three strains of bacteria known to cause osteitis, the Defendant finally acknowledged Ruth's foot was infected, but continued trimming, knowing there was a risk of osteitis. (Exhibit 11, Clinical notes dated July 29, 2021)

36. Between April 27 and August 6, 2021, the Defendant's veterinarian took

three sets of radiographs and three times claimed no osteomyelitis (osteitis) was present. (See Exhibit 6, April 27 clinical records and Exhibit 10, Clinical records dated June 4, 2021).

37. But by June 4, Ruth's outermost toe bone was already gone. (Exhibit 12, Brookfield report, dated August 6, 2021, refers to P3 [toe bone] gone "two months ago.")

38. On August 6, when additional radiographs were taken, the Defendant's veterinarian<sup>12</sup> for the third time claimed no osteomyelitis was present. (Exhibit 13, August 6, 2021 clinical records.) By this time, the infection had taken another toe bone on that digit, according to the report by DACVR Eric T. Hostnik of Brookfield Zoo.

39. The Defendant continued trimming, even after receiving the DACVR's report finding septic osteitis, with surgical debridement as a possible cause, in late August.

40. In fact, the Defendant's veterinarian ordered "stall rest" beginning in August, unheard of for osteitis and canker. Ruth was forced to stay in the same fetid conditions that caused the infection that trimming forced into her toe bones. She developed cellulitis, an infection of the connective tissue. Ruth has not

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<sup>12</sup> Defendant's veterinarian is not a Diplomate of the American College of Veterinary Radiology (DACVR).

presented with cellulitis in records dating back to 2005.

41. Radiographs taken August 27, 2021 clearly show two toe bones are missing (Exhibit 14 Radiograph, Ruth's left front foot, August 27, 2021). The Defendant issued a press release claiming it was "age-related." (Exhibit 15, Email dated September 22, 2021)

42. Since then, additional radiographs were taken September 23 and October 28, 2021 and November 16. It is unclear whether the osteitis has slowed. (Exhibit 16, Brookfield report dated October 28, 2021 received November 2, 2021<sup>13</sup>). However, the Defendant stopped administering antibiotics to Ruth on November 2, 2021.<sup>14</sup>

43. What is clear is that Ruth's infection in her front left foot had spread not only to her right foot in July, but to Emily's right foot, too.

44. Emily. Asian elephant Emily is approximately 57 years old, and was purchased by the Defendant in 1968 at age 4 years. She is larger than Ruth by about 1500 lbs. Currently she weighs 7755 lbs. Her maximum weight was 8707 lbs. in 2019.

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<sup>13</sup> The first annotated radiograph identifies two structures as Digit 2 and a lytic distal P1. However, both the August Brookfield report, which uses the August 6 radiographs and the August 27 radiographs indicate that P2 and P3 are already gone.

<sup>14</sup> The November 18 Brookfield report indicates the beginning of resorption of interphalangeal joint D2-D3, which might indicate an active bacterial infection.. However, that report is under review.

45. Emily has been on a reduced diet for six years. However, she has been allowed to walk around the small half-acre exhibit, and to drink and cool as needed. Although her diet and exercise is still subpar for what adult elephants require, she has not been restrained from moving for hours at a time nor prevented from eating.

46. In July 2021, Emily was first diagnosed with pododermatitis. (Exhibit 17, Clinical records dated July 16, 2021). No trimming or cryotherapy was performed although Emily had a nail canker and was visibly in pain. In this video taken on July 15, 2021, she is seen holding her right front foot up. (<https://m.youtube.com/watch?v=zAOJyWZot3U>).

47. Beginning in August 2021, Emily was separated from Ruth during the day by a metal gate between the outer yard and the area near the barn. No records were available to Plaintiff for the period August 28 to September 15, 2021. (Exhibit 18, Clinical records August 28-September 9, and September 9 to September 25, 2021).

48. Yet Emily was seen holding her right front foot up in pain through to September (Video taken September 9, 2021 <https://youtu.be/22cTYh1xHqY>).

As recently as October 2-5, Emily was holding up first her left rear foot and then her right rear foot.

49. Emily's hoof radiographs from June 2021 were provided to Plaintiff on

October 27, 2021, and indicate a proliferative pododermatitis on her right front hoof, digit 4. Recent clinical records indicate her proliferative pododermatitis is being treated and only occasionally trimmed. She is not receiving cryotherapy or antibiotics (Exhibit 19, Clinical records for Emily from September 15, 2021 to November 29, 2021) Based on Plaintiff's daily observations, Emily's movement is not restricted (other than by the closed gate), she is not ordered to stand still for hours at a time, and she is allowed to eat, graze and drink at will.

50. The Defendant City has attempted to attribute Ruth's pododermatitis and subsequent osteitis to her hoof conformation (pigeon-toed stance). If the etiology of the pododermatitis was not due to the presence of moist unsanitary conditions on hard-packed substrate in the barn, Emily would not have presented with it--she is able to exercise, eat her full allotment of food, drink at will, and is not pigeon-toed.

51. If Emily's pododermatitis runs a course similar to Ruth's, it will not resolve for 12-18 months (See Exhibit 10, Clinical notes for Ruth.)

#### **IV. LEGAL FRAMEWORK**

52. An "endangered species" identified by the ESA is "any species in danger of extinction." 16 USC § 1531(b). Section 9 of the ESA prohibits the "taking" of any endangered species and also makes it illegal to "possess" any endangered species that has been unlawfully "taken." Id. § 1538(a)(1)(B) and (a)(1)(D).

53. The term "take" is defined by the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct." Id. § 1532 (19). The term "harm" includes any act that "kills or injures" an endangered animal. 50 CFR § 17.3.

Harass in the definition of "take" in the Act means "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

- (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
- (2) Breeding procedures, or
- (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife."

54. The harassment exception that the zoo industry uses is debatable in its application to Ruth and Emily (See, Rowley's Petition for a Writ of Certiorari, USCt C/N 20-1802, Denied, 10/4/21).

55. There is no exception to the harm "take." Both elephants have been injured by the Defendant's actions and inactions.



56. The Defendant cannot use the ESA harassment exception because the circumstances of the herein claims are not generally accepted animal husbandry practices. See *Hill v. Coggins*, 867 F.3d 499 (2017) at 504: " the Zoo's virtually barren concrete pit enclosures, public feeding arrangements, and apparent lack of meaningful enrichment programs fell short of generally accepted animal husbandry practices..." See also: *Kuehl v. Sellner*, 161 F.Supp.3d 678 (2016), "...Moreover, Defendants have not provided adequate sanitation in compliance with generally accepted animal husbandry practices," and *PETA v. Tri-State Zoological Park of Western Maryland, et al*, 397 F.Supp.3d 768 (2019) citing Captive-bred Wildlife Regulation, 63 Fed. Reg. 48,634-02, 48,638 (Sept. 11, 1998) noting that the exception was intended to exclude "normal husbandry practices that are not likely to result in injury." (Emphasis added.)

57. The Animal Welfare Act (AWA) is administered by the U.S. Department of Agriculture Animal Plant Health Inspection Services (USDA APHIS) Animal Care division. That agency has twice inspected the Defendant zoo in the past year and found no noncompliant issues (See: <https://efoia-pal.usda.gov/App/PalLogin.aspx>, July 21 and October 27, 2021.)

58. USDA APHIS' failure to enforce the AWA has received national scrutiny for allowing the Connecticut-based Commerford Zoo to transport an extremely ill Asian elephant to the Big E Fair in Springfield, MA to give rides in 2019. The

elephant died in the Big E parking lot three days later. (See:

<https://api.nationalgeographic.com/distribution/public/amp/animals/article/usda-accused-of-ignoring-animal-welfare-for-business-interests?>, National Geographic, October 13, 2021).

59. Additionally, the animal welfare organizations People for the Ethical Treatment of Animals (PETA), the Humane Society of the United States and others have supported federal legislation to force USDA APHIS to enforce the AWA.<sup>15</sup> As proposed, that legislation would not apply to Association of Zoos & Aquarium (AZA) accredited zoos.

60. Defendant's Buttonwood Park Zoo was first accredited by AZA in 2003. Since then it has never been cited by the AZA for violations of the AWA or AZA guidelines, even when the zoo was cited and fined by USDA APHIS for a direct violation of the AWA in 2014.<sup>16</sup> An AZA audit team found no violations at the time, nor was the Defendant zoo's accreditation revoked, despite Ruth's hypothermia, frostbite, loss of parts of her ears and 10" of her tail from exposure to freezing temperatures when she was found outside the barn during a blizzard.

61. Provision of a sanitary shelter for Ruth and Emily is required under Part 3,

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<sup>15</sup> H.R. 3277, Animal Welfare Enforcement Improvement Act, 2021.

<sup>16</sup> See related case 17-cv-11809, AWA violation for failure to shelter Asian elephant Ruth in extreme cold, harm resulting.

Subpart F, § 3.1.25(d), § 3.126(d), and § 3.131 of the AWA.

62. The conditions that led to Ruth's and Emily's pododermatitis are not generally accepted animal husbandry practices.

## **V. CLAIMS**

63. Claim I. Defendant City has taken Ruth and Emily in violation of Section 9 of the ESA: Unsanitary barn; failure to repair roof, forced confinement.

64. Ruth's long list of injuries--loss of use of her trunk, loss of half her tail, loss of half her right ear, now includes loss of at least two toe bones. Emily may be losing toe bones, or worse if her pad is infected.

65. This current harm was entirely preventable, and was caused by the Defendant's actions and inactions. By not repairing the barn roof for over two years, not removing water sources in Ruth's stall, failing to remove the barn flooring for six months; failing to take waste-contaminated soil off site; failing to recognize Ruth's weight loss for two years despite a visibly worsening body condition, and failing to let Ruth exercise, the Defendant City created perfect conditions for hoof rot. The Defendant then ignored recommendations from nine consulting veterinarians and experienced zoo staff at other zoos; ignored two sets of cultures and biopsies for three months, and misread radiographs for four months, all of which caused bacteria to proliferate and infect Ruth's left front foot toe bones, for osteitis to spread, for Ruth's right front foot to become infected, and

for the bacterial infection to spread to Emily's right front foot.

66. Plaintiff asserts that these acts were part of an overall plan by the Defendant to intentionally cause Ruth harm--injury and death, although finding of a 'take' does not require intent.

67. As a result of Defendant's actions, Emily also developed pododermatitis and suffered harm.

68. Claim II. Take caused by Defendant City harms and harasses Ruth and Emily in violation of 9 of the ESA: Inadequate shelter in inclement weather, lack of exercise, food deprivation.

69. The City Zoo harms and harasses Ruth by confining her in a facility that exposes her to extreme heat and extreme cold without shelter and significantly disrupts her normal behavioral patterns, including sheltering and feeding.

70. Ruth was routinely forced to stand still for up to four hours under the roofless hut, and also at the barn door, in extremely hot weather, including during heat advisories, and extremely cold weather. During those times, she was prohibited from moving. This forced lack of exercise caused or exacerbated her arthritis in her joints, and significantly contributed to her pododermatitis and osteitis.

71. Further, Ruth was deprived of food, water and the ability to cool during that time, which caused her to lose 15% of her body weight. The resulting poor

nutrition and poor body condition also significantly contributed to her pododermatitis and osteitis.

72. When Ruth was allowed to move, she immediately went to water to drink and spray on herself to cool, and to dust. She then looked for food.

73. On several occasions in August 2020, Ruth was kept inside the barn during 100°F temperatures for hours with the barn doors closed. She was not allowed access to water to cool. When she was released, she immediately sought water to cool. The barn is not air conditioned.

74. This intentional refusal to provide adequate nutrition and exercise resulted in a 532 lb. weight loss in the past two years, and a poor body condition. This radical weight loss was not identified as problematic until October 2021. This neglect significantly contributed to the pododermatitis and osteitis.

75. Emily was confined to the outer yard, an 8,000 s.f. area, for eight hours each day during the same periods of Ruth's confinement. This lack of exercise and exposure to extreme temperatures caused or exacerbated her arthritis and contributed to her hoof rot on her right foot. Emily's reduced diet led to a 10% weight loss and rapid decline in her body condition that also contributed to her pododermatitis, an ongoing condition.

## **VI. PRAYER FOR RELIEF**

### **Jury Trial Demand**

76. Plaintiff Rowley demands a jury trial pursuant to Rule 48 for all triable issues.

### **Declaratory and Injunctive Relief**

77. Plaintiff Rowley is entitled to Declaratory and Injunctive relief. Plaintiff suffers and continues to suffer actual injuries from knowing that Ruth and Emily are harmed by Defendant's negligence and mistreatment. Rowley is harmed emotionally, spiritually, and aesthetically. This harm is irreparable because it cannot be measured.

78. Legal remedies which do not remove Ruth and Emily from the Zoo are illusory. Merely declaring that the Defendant's treatment of Ruth and Emily violates Section 9 of the ESA does not by itself remedy Plaintiff's injuries.

79. There is a substantial likelihood that Plaintiff will succeed on the merits of this case. The Defendant's mistreatment of Ruth and Emily glaringly violates Section 9 of the ESA and so is prohibited.

80. The Defendant will not be harmed by removal of the elephants. Zoogoers are buying tickets to see elephants whose living condition is so filthy their foot bones are infected. That does not serve *any* public interest. The elephants' suffering outweighs the Defendant's self-interest in keeping them.

81. All conditions precedent to Plaintiff's claims for relief have been performed or occurred prior to filing this complaint.

82. Plaintiff demands a jury trial of any triable issues pursuant to Rule 38 of the Federal Rules of Civil Procedure.

83. The conditions under which the Defendant holds Ruth and Emily as described above "takes" them in violation of Section 9 of the ESA, 16 USC § 1538(a)(1)(D). These unlawful activities injure Plaintiff.

84. THEREFORE, Plaintiff requests that this Court enter a judgement:

- a) Declaring that the Defendant City's treatment of Ruth and Emily violates Section 9 of the Endangered Species Act;
- b) Enjoining the Defendant from euthanizing either elephant so that they may be removed to an appropriate facility;
- c) Enjoining the Defendant from continuing to violate the Endangered Species Act;
- d) Enjoining the Defendant from continuing to possess Ruth and Emily;
- e) Enjoining the Defendant from transferring Ruth and Emily to the Buttonwood Park Zoological Society, or another public or private zoo;
- f) Allowing Plaintiff's veterinarian(s) to inspect Ruth and Emily in the barn;
- g) Transferring Ruth and Emily to Plaintiff for transport to a sanctuary with appropriate elephant facilities and staffing;

- h) Awarding transport costs to Plaintiff;
- i) Allowing Plaintiff to attend the necropsy and awarding Plaintiff either elephant's remains should either die at the zoo;
- j) Granting Plaintiff any other such relief as may be equitable.

Respectfully submitted,  
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